

43-2151

**In the United States Bankruptcy Court  
for the  
Southern District of Georgia  
Savannah Division**

**FILED**

at 2 O'clock & 29 min P M  
Date 11/24/99

MICHAEL F. McHUGH, CLERK  
United States Bankruptcy Court  
Savannah, Georgia *MB*

In the matter of: )  
)  
ANTILLES LLOYD (Bermuda), LTD. )  
)  
Debtor )

Chapter 7 Case

Number 93-42151

**ORDER ON MOTION FOR REHEARING**

This case has been pending since 1993, having originally been filed on December 16, 1993, as an involuntary Chapter 7 case by creditors of Antilles Lloyd (Bermuda), Ltd. On May 1, 1996, the Court considered an application by the Trustee, Wiley A. Wasden, III, to compromise a controversy. Following consideration of the evidence on that date this Court entered an Order granting the Trustee's Motion and the compromise between the estate and the Colonial Companies was approved on the terms proposed by the Trustee.

Because of ongoing ancillary litigation between the Colonial companies and parties formerly associated with the Debtor company, Ms. Jeannie McDaniel initiated an effort to obtain a transcript of an April 1, 1996, hearing which was conducted before this Court. She paid the contract court reporter for a copy of the transcript of that hearing

but the court reporter was subsequently unable to produce a transcript. At some point the court reporter ceased to communicate on a timely basis with Ms. McDaniel who then sought the assistance of the Clerk of this Court in attempting to locate the missing transcript. Substantial effort was devoted by the staff of this Court to assist Ms. McDaniel and to work with the court reporter to locate the transcript, but that search was to no avail. In the aftermath of the inability to obtain a transcript, Ms. McDaniel on July 1, 1999, filed a Motion asking that the Court rehear the Trustee's Motion to compromise the controversy. The purpose stated for requesting the rehearing was to require the Trustee and the Colonial companies to reintroduce the evidence which was heard by the Court on April 1, 1996, so that a reconstructed transcript of those proceedings might be obtained, and in particular, so that the evidence which this Court in its Order had described as "overwhelming" and "uncontroverted" would be officially recorded.

At a hearing to consider the Motion for Rehearing on August 25, 1999, objections were interposed by the Colonial companies and by the Trustee, Wiley A. Wasden, III. The Movants state that their purpose is not to challenge the settlement which the Court approved in 1996, but simply to have the testimony reconstructed from the April 1, 1996, hearing. The Trustee objects asserting that there is no bankruptcy-related purpose to reconstructing the testimony from that hearing in light of the fact that the Motion to approve the compromise was not appealed from at that time and that there is no effort now

to vacate, set it aside, or alter its terms in any way. Colonial objects to the Motion on the related ground that the only purpose asserted by the Movants for utilization of that reconstructed testimony has to do with ancillary litigation between Colonial and Movant Kenneth Mayeux and others pending in the United States District Court for the Southern District of Georgia. Colonial contends that, under applicable authority, relief such as a new trial or a rehearing is justified only when a party can show that the missing transcript has resulted in some specific prejudice to the moving party, which the Movants have not proven.

While a verbatim transcript of the hearing in issue on April 1, 1996, is not available, this Court's courtroom deputy clerk maintains, and the Court retains in the file, hearing notes in all proceedings, constituting a summary of the argument and the testimony taken by the Court. Taking judicial notice of those notes, I will summarize those proceedings as follows:

The Debtor, Antilles Lloyd (Bermuda), Ltd., was placed in an involuntary bankruptcy proceeding by certain of its creditors. As an involuntary case it was extraordinarily difficult for the Trustee to administer and considerable time was spent attempting to locate pertinent records of the company in order to determine what its assets were, who its creditors were, and how much they were owed. At some point during the

administration of the case, the Trustee, reviewing payments by Antilles Lloyd (Bermuda), Ltd., to the Colonial companies, contemplated the possibility that the estate might have a claim for preferential payments to Colonial.

The Trustee held all the Debtor's assets, including accounts receivable in a face amount totaling over one hundred thousand dollars. When the Trustee began collecting the accounts receivable, Colonial asserted that it held a valid perfected first security interest in those receivables that would entitle it to their proceeds. Simultaneously, the Trustee received evidence which suggested that the payments made by Debtor to the Colonial companies could not be recovered as preferential. Ultimately the Trustee and the Colonial companies negotiated a settlement whereby the Colonial companies would waive and release any security interest held in the accounts receivable proceeds in exchange for a release by the Trustee of any potential liability for preferential payments.

At the hearing on April 1, 1996, counsel for Ken Mayeux objected to the compromise. As a basis for the compromise the Trustee made several representations.

Due to their age and other collectability problems, the maximum recovery of the receivables would be approximately \$20,000.00, significantly less than their face amount. If correct as to the status of its claim as secured, Colonial would receive all of that money.

The records for the one year period prior to filing revealed that, while there were substantial payments back and forth between the Debtor and Colonial, there was no net transfer of funds from the Debtor to Colonial within the one year period. One year prior to filing, Antilles owed Colonial \$1.758 million. On or about the date of the filing of the case, the debt of Antilles to Colonial had risen to \$2.775 million, causing a negative flow of funds between the parties of approximately \$1 million, flowing from Colonial to Antilles.

The only other sworn testimony at the hearing was offered by Frank Brown, Colonial's Vice President of Finance. Under oath, Brown testified, without impeachment or contradiction by any party, to the cash reconciliation which had been adopted by the Trustee. Brown stated that (1) that on December 16, 1992, the Debtor owed Colonial \$1,748,000.00; (2) that the operations of Antilles were funded by Colonial for several months after that; and (3) by July 31, 1993, Antilles owed Colonial \$2.775 million based on net advances provided to the Debtor by Colonial. After that date Colonial made no further advances to the Debtor.

Counsel for Ken Mayeux along with Ms. McDaniel, appearing *pro se*, continued to argue that fraudulent activities, operating to the benefit of Colonial, had occurred. Mr. Mayeux's counsel, in particular, argued that the Court should consider that

the Debtor was under capitalized, contending that the parent corporation, Colonial, paid monies denominated as a loan which should in fact be recharacterized as capital contributions, making the proceeds of payments made by the Debtor to Colonial preferential in nature.

While those allegations raised a serious issue as to the approval of the Trustee's compromise, the objecting parties did not introduce any evidence to support their contentions. The Trustee argued in support of his application that he was unable to find evidence which would support his proceeding on the issue of preferential transfers against Colonial. His testimony was supported by the testimony of Mr. Brown, as outlined earlier, as to the net contributions of Colonial to the Debtor during the twelve month period prior to filing bankruptcy.

This Court concluded that there was "overwhelming" and "uncontroverted" evidence to support the Trustee's application to compromise. While those adjectives might be seen as overly-generous by the objecting parties, it is true, at the very least, that the evidence was uncontradicted. Moreover, as previously noted, no appeal was taken from that decision at a time when, surely, there would have been no difficulty in obtaining a transcript. Having considered the evidence before me, taking judicial notice of the previous proceedings, and in light of applicable authority, I deny the

Motion. It is, as the Court stated at the hearing in this matter, very distressing that an official record of proceedings before this Court cannot be located. However, in an imperfect world it must be assumed that such an unfortunate occurrence happens from time to time.

The former Fifth Circuit and the Eleventh Circuit have articulated the standards for granting relief in such instances and I agree with the objecting parties that the standards have not been met in this case. Failure to comply with the Court Reporter Act, 28 U.S.C. § 753, upon which the Movants rely, is not held to be error *per se*. Strauss v. United States, 311 F.2d 926, 933 (5<sup>th</sup> Cir. 1963), *cert. denied*, 373 U.S. 910 (1963). A failure to comply with the Act will not work in a reversal absent a specific showing of prejudice. United States v. Selva, 559 F.2d 1303, 1305 (5<sup>th</sup> Cir. 1977). For example, the appellant must show that failure to record and preserve the specific portion of the trial proceedings visits a hardship upon him and prejudices his appeal. *Id.* Some specific error or prejudice must be called to the Court's attention. United States v. Alfonso, 552 F.2d 605, 620 (5<sup>th</sup> Cir. 1977), *cert. denied*, 434 U.S. 857 (1977). This rule also applies in situations in which there are federal and state proceedings. In a federal case brought by a state prisoner, the absence of a perfect transcript does not violate due process absent a showing of specific prejudice. White v. Florida Dept. of Corrections, 939 F.2d 912, 914 (11<sup>th</sup> Cir. 1991).

The Movants have shown and can show no specific prejudice to them arising out of the inability to obtain a verbatim transcript of the proceeding. In addition, the Movants do not attempt to overturn or obtain any relief from this Court's Order approving that compromise. The Trustee carried the burden of proof for the Court's approval of the compromise in 1996. In light of the fact that there is no direct or collateral attack on that judgment, no bankruptcy purpose to be served, and no prejudice shown to these Movants, the Motion is denied.



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Lamar W. Davis, Jr.  
United States Bankruptcy Judge

Dated at Savannah, Georgia

This 22<sup>nd</sup> day of November, 1999.